A

Lim Beng Kuan v Helms Geomarine Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-130–04 OF 2022
ONG CHEE KWAN J
25 AUGUST 2022

C *Civil Procedure — Summary judgment — Brokerage commission, claim for — Parties entered into commission agreement — Defendant failed to pay commission to plaintiff — Whether payment of commission subjected to defendant's agreement with third party or third party's consent — Whether plaintiff could rely on commission agreement — Whether commission agreement* D *was varied — Whether plaintiff entitled to claim commission on behalf of plaintiff's nominee — Whether defendant could set off plaintiff's claim with defendant's claim which arose from different and independent contract — Whether there were bona fide triable issues raised by defendant*

E The plaintiff had secured a contract ('the contract') for the defendant for the pre-investigation survey works in the Taipower 26 Wind Farm project in Taiwan ('the project') from Foxwell Energy Corp Ltd ('Foxwell') of Taiwan. Via a commission agreement ('the commission agreement'), the defendant agreed to pay to the plaintiff, or his nominee known as GPK Marine Management F Services Group ('GPK') a commission of 10% of the payments received by the defendant from Foxwell within 14 days of each receipt. The defendant had carried out the work under the contract and received payments either directly or indirectly from Foxwell but the defendant failed to pay the 10% commission to the plaintiff. It ought to be noted that, via an assignment deed dated 4 March G 2022 ('the assignment deed'), GPK had absolutely assigned all its right for the commission to the plaintiff. The defendant also failed to respond to the letter of demand issued by the plaintiff to the defendant. The plaintiff then filed the present application for partial summary judgment ('encl 5') in relation to the plaintiff's entitlement to 10% commission of the monies received by the H defendant directly from Foxwell. As for the remaining of the claim ie, the commission in relation to the non-direct payments made by Foxwell to the defendant's contractors, such claim would be heard in full trial. In opposing the plaintiff's application for summary judgment, the defendant submitted that it was not required to pay the 10% commission because: (a) the commission I agreement was subject to the consent of one Dolphin Geo Subsea Pte Ltd ('Dolphin') through a teaming agreement dated 9 June 2020 entered into between Dolphin and the defendant; (b) the plaintiff could not rely on the contents of the commission agreement because the payment term of the commission was varied from 'commission due to be paid within 14 days upon

the defendant's receipt of each payment from Foxwell' to 'commission due to be paid upon the defendant's receipt of the retention sum from Foxwell' — it ought to be noted that due to the failure of the defendant to provide bank guarantee/performance bond to Foxwell, the defendant and Foxwell had entered into a supplementary agreement which provided that the retention sum of 10% was to replace the said bank guarantee/performance bond; (c) the plaintiff was not entitled to claim the 10% commission on behalf of GPK; and (d) the defendant had a counterclaim against the plaintiff for overpayment in respect of the assistance and services that the plaintiff provided for the defendant in the execution of the contract.

Held, granting order in terms of prayers (1), (2) and (4) of encl 5 with costs of RM10,000 subject to payment of allocator:

(1) In relation to the teaming agreement between the defendant and Dolphin, the plaintiff was not a party to and not involved with the teaming agreement, which was an internal matter between the defendant and Dolphin. Nowhere in the commission agreement was it stated that the commission payable was subject to Dolphin's consent, or any agreement made between the defendant and Dolphin. Further, the conditions laid out in the teaming agreement did not support the defendant's version that the commission payable to the plaintiff was subject to Dolphin's consent (see paras 23–24 & 26).

(2) There was no credible evidence that the commission agreement was varied to the effect that the commission would be paid from any retention sum. The retention sum being a replacement for the bank guarantee/performance bond did not in any way affect the commission payable to the plaintiff as agreed in the commission agreement. It followed that the obligation of the defendant to pay the commission was not tied to the retention sum (see paras 29–31).

(3) The plaintiff had obtained confirmation from Foxwell that the contract had been completed and the entire final accounts between the defendant and Foxwell, including the retention sum, was closed. Notably, the defendant had admitted that so far, Foxwell had paid them a sum of USD3,359,286.50, save that they alleged the retention sum had not been paid. However, the retention sum was agreed to be set off from the amount payable by Foxwell to the defendant. It was disingenuous for the defendant to claim that the retention sum was never 'paid' by Foxwell under the circumstances. The defendant's admission supported the plaintiff's version that Foxwell had paid the defendant, albeit a slight discrepancy in the total sum admitted, while the actual sum that was remitted to the defendant was indeed USD3,359,325 in accordance with

the remittance advices. Accordingly, the defendant had no defence insofar as the partial summary judgment was concerned (see paras 34–37).

(4) The defendant's allegation that the plaintiff was not entitled to claim the 10% commission on behalf of GPK was baseless because GPK had absolutely assigned all its right for the commission to the plaintiff by the assignment deed in which the defendant was notified of the same. Even in the absence of the assignment, the plaintiff was the right person with locus to claim the commission from the defendant as the commission agreement was between the plaintiff and defendant. There was no reason for GPK to be made a party to this action (see para 38).

(5) In relation to the defendant's counterclaim, the plaintiff had demonstrated that this issue of 'overpayment' had been closed between the parties. The defendant's very own statement of account produced showed the account of the plaintiff with zero balance as of 24 May 2022. There was therefore no overpayment. In any case, if there were indeed overpayment, such overpayment which arisen from a different and independent contract could not be set off against the claim for the commission (see paras 42–44).

(6) Based on the above findings, the court found no bona fide triable issues raised by the defendant in respect of the plaintiff's claim for summary judgment (see para 22).

[Bahasa Malaysia summary

Plaintif telah memperoleh kontrak ('kontrak') untuk defendan bagi kerja tinjauan pra-penyiasatan dalam projek 'Taipower 26 Wind Farm' di Taiwan daripada Foxwell Energy Corp Ltd ('Foxwell') Taiwan. Melalui satu perjanjian komisen ('perjanjian komisen tersebut'), defendan bersetuju untuk membayar kepada plaintif, atau penamanya yang dikenali sebagai GPK Marine Management Services Group ('GPK') komisen sebanyak 10% daripada bayaran yang diterima oleh defendan daripada Foxwell dalam tempoh 14 hari dari setiap penerimaan. Defendan telah menjalankan kerja di bawah kontrak tersebut dan menerima bayaran sama ada secara langsung atau tidak langsung daripada Foxwell tetapi defendan gagal membayar komisen 10% kepada plaintif. Perlu diingat bahawa, melalui surat ikatan penyerahan hak bertarikh 4 Mac 2022 ('surat ikatan penyerahan hak tersebut'), GPK telah menyerahkan sepenuhnya semua haknya untuk komisen tersebut kepada plaintif. Defendan juga gagal menjawab surat tuntutan yang dikeluarkan oleh plaintif kepada defendan. Plaintif kemudiannya memfailkan permohonan semasa untuk penghakiman terus separa ('lampiran 5') berhubung dengan hak plaintif ke atas 10% komisen daripada wang yang diterima secara langsung oleh defendan daripada Foxwell. Bagi baki tuntutan iaitu, komisen berhubung dengan bayaran secara tidak langsung yang dibuat oleh Foxwell kepada

kontraktor-kontraktor defendan, tuntutan tersebut akan didengar dalam perbicaraan penuh. Dalam menentang permohonan plaintif untuk penghakiman terus, defendan berhujah bahawa ia tidak perlu membayar komisen 10% tersebut kerana: (a) perjanjian komisen tersebut tertakluk kepada persetujuan Dolphin Geo Subsea Pte Ltd ('Dolphin') melalui 'teaming agreement' bertarikh 9 Jun 2020 yang dimeterai antara Dolphin dan defendan; (b) plaintif tidak boleh bergantung kepada kandungan perjanjian komisen tersebut kerana terma pembayaran komisen telah diubah daripada 'komisen yang perlu dibayar dalam tempoh 14 hari selepas defendan menerima setiap pembayaran daripada Foxwell' kepada 'komisen yang perlu dibayar apabila defendan menerima wang tahanan daripada Foxwell' — perlu diambil perhatian bahawa disebabkan kegagalan defendan untuk memberikan jaminan bank/bon pelaksanaan kepada Foxwell, defendan dan Foxwell telah menandatangani perjanjian tambahan yang memperuntukkan bahawa wang tahanan sebanyak 10% adalah untuk menggantikan jaminan bank/bon pelaksanaan tersebut; (c) plaintif tidak berhak menuntut komisen 10% bagi pihak GPK; dan (d) defendan mempunyai tuntutan balas terhadap plaintif untuk lebihan bayaran berkenaan dengan bantuan dan perkhidmatan yang plaintif berikan untuk defendan dalam pelaksanaan kontrak tersebut.

Diputuskan, membenarkan perintah seperti dipohon dalam permohonan (1), (2) dan (4) dalam lampiran 5 dengan kos sebanyak RM10,000 tertakluk kepada alokator:

(1) Berhubung dengan 'teaming agreement' antara defendan dan Dolphin, plaintif bukanlah pihak dan tidak terlibat dengan perjanjian tersebut, yang mana ia merupakan perkara dalaman antara defendan dan Dolphin. Tiada dinyatakan langsung dalam perjanjian komisen tersebut bahawa komisen yang perlu dibayar adalah tertakluk kepada persetujuan Dolphin, atau apa-apa perjanjian yang dibuat antara defendan dan Dolphin. Selanjutnya, syarat yang dibentangkan dalam 'teaming agreement' tersebut tidak menyokong versi defendan bahawa komisen yang perlu dibayar kepada plaintif adalah tertakluk kepada persetujuan Dolphin (lihat perenggan 23–24 & 26).

(2) Tiada keterangan yang boleh dipercayai bahawa perjanjian komisen tersebut telah diubah yang menyebabkan komisen tersebut akan dibayar daripada apa-apa wang tahanan. Wang tahanan sebagai pengganti bagi jaminan bank/bon pelaksanaan tidak sama sekali menjejaskan komisen yang perlu dibayar kepada plaintif seperti yang dipersetujui dalam perjanjian komisen tersebut. Oleh yang demikian, kewajipan defendan untuk membayar komisen tersebut tidak terikat dengan wang tahanan tersebut (lihat perenggan 29–31).

(3) Plaintif telah mendapatkan pengesahan daripada Foxwell bahawa kontrak tersebut telah selesai dan keseluruhan akaun akhir antara

defendan dan Foxwell, termasuk wang tahanan tersebut, telah ditutup. Terutamanya, defendan telah mengakui bahawa setakat ini, Foxwell telah membayar mereka sejumlah USD3,359,286.50, kecuali mereka mendakwa wang tahanan tersebut belum dibayar. Walau bagaimanapun, wang tahanan tersebut telah dipersetujui untuk ditolak daripada jumlah yang perlu dibayar oleh Foxwell kepada defendan. Adalah tidak jujur bagi defendan untuk mendakwa bahawa wang tahanan tersebut tidak pernah 'dibayar' oleh Foxwell dalam keadaan tersebut. Pengakuan defendan menyokong versi plaintif bahawa Foxwell telah membuat bayaran kepada defendan, walaupun terdapat sedikit percanggahan dalam jumlah wang yang diterima, di mana jumlah sebenar yang dibayar kepada defendan sememangnya USD3,359,325 berdasarkan makluman kiriman wang. Oleh yang demikian, defendan tidak mempunyai pembelaan berkaitan dengan penghakiman terus separa tersebut (lihat perenggan 34–37).

(4) Dakwaan defendan bahawa plaintif tidak berhak menuntut komisen 10% bagi pihak GPK adalah tidak berasas kerana GPK telah menyerahkan sepenuhnya semua haknya untuk komisen tersebut kepada plaintif melalui surat ikatan penyerahan hak di mana defendan dimaklumkan tentang perkara yang sama. Walaupun dalam ketiadaan penyerahan hak tersebut, plaintif adalah orang yang berhak yang mempunyai lokus untuk menuntut komisen daripada defendan kerana perjanjian komisen tersebut adalah antara plaintif dan defendan. Tiada sebab untuk GPK dijadikan pihak dalam tindakan ini (lihat perenggan 38).

(5) Berhubung dengan tuntutan balas defendan, plaintif telah menunjukkan bahawa isu 'lebihan bayaran' ini telah ditutup antara pihak-pihak. Penyata akaun defendan sendiri yang dikemukakan menunjukkan akaun plaintif dengan baki sifar setakat tarikh 24 Mei 2022. Oleh itu, tiada lebihan bayaran. Walau apa pun, jika memang terdapat lebihan bayaran, lebihan bayaran tersebut yang timbul daripada kontrak yang berbeza dan berasingan tidak boleh ditolak daripada tuntutan komisen tersebut (lihat perenggan 42–44).

(6) Berdasarkan dapatan-dapatan di atas, mahkamah mendapati tiada isu yang boleh dibicarakan secara bona fide yang dibangkitkan oleh defendan berkenaan dengan tuntutan plaintif untuk penghakiman terus (lihat perenggan 22).]

Cases referred to

United Trade Arena (M) Sdn Bhd & Ors v Bank Pertanian Malaysia Bhd [2016] 2 MLJ 65; [2016] 2 MLRA 116, CA (refd)

Arun Kasi (with Nicole Lee Hui Ching) (Arun Kasi & Co) for the plaintiff.

Alan Wong (with Shahir Tahir) (Zain Megat & Murad) for the defendant.

Ong Chee Kwan J:

BACKGROUND FACTS

[1] The defendant is a Malaysian-based company specialising in the offshore soil investigation and geotechnical engineering services.

[2] In or about the last quarter of 2020, the plaintiff negotiated with Shinfox Energy group of Taiwan the procurement of a contract for the defendant for pre-investigation survey works in the Taipower 26 Wind Farm project in Taiwan ('project'), and thus provided the brokerage service in connection with the same.

[3] The plaintiff did so upon the defendant's promise to pay him, if the contract was awarded to the defendant, a commission of 10% of the payments received by the defendant on the project within 14 days of each receipt.

[4] The said commission agreement (service brokerage) was recorded in the defendant's letter dated 21 September 2020 to the plaintiff, whereby the defendant agreed to pay the plaintiff and his nominee GPK Marine Management Services Group FZ-LLC ('GPK') the said commission within the said timeline.

[5] The defendant also authorised the plaintiff to sign the contract for the project and any other relevant documents with the said Shinfox Energy group by a power of attorney dated 4 November 2020 given to him.

[6] The negotiations and brokerage service were successful, and the contract was duly awarded to the defendant by Foxwell Energy Corp Ltd of Taiwan, a company in the Shinfox Energy group, and the plaintiff signed the same on the defendant's behalf on 15 December 2020 ('contract').

[7] Subsequently, the defendant carried out works under the contract and received payments from Foxwell.

[8] To the plaintiff's knowledge, the total payment received by the defendant under the contract is USD4,129,247. The payment was received by the defendant in a few tranches and some of them were paid by Foxwell directly to the defendant, while others were paid to the sub-contractors appointed by the defendant on account and behalf of the defendant. Hence, the total principal sum of commission payable to the plaintiff is USD412,924.70 (before interest is added).

[9] The defendant has not, to date, paid the agreed brokerage commission or any part thereof.

[10] The said GPK has absolutely assigned all its right for the commission to the plaintiff by a document of absolute assignment and transfer of rights dated 4 March 2022 ('assignment deed') in which the defendant was notified of the same. Accordingly, the entire commission agreed is payable to the plaintiff.

[11] The plaintiff, through his solicitors in Malaysia, issued a pre-litigation notice to the defendant dated 10 March 2022 ('LOD'), albeit the sum claimed in the LOD was slightly different from that claimed in the writ herein. A copy of the assignment seed was attached to the LOD.

[12] There was no reply to the LOD and the plaintiff issued the writ herein on 1 April 2022.

[13] In the meantime, on or about 5 October 2021, the defendant first admitted to the plaintiff the commission due in the sum of USD310,000 followed by the defendant's admission on or about 6 October 2021 of the commission due in the sum of USD312,000 both based on the monies received by the defendant respectively as at then according to the defendant. Subsequently on or about 4 March 2022, the defendant admitted the commission in the sum of USD52,114 which the plaintiff did not agree to.

[14] For the purpose of the plaintiff's application for summary judgment, the undisputed key facts can be summarised as follows:

(a) the plaintiff provided brokerage service for the defendant in respect of the contract;

(b) the defendant issued the commission agreement to pay the plaintiff a commission of 10% of the payments received by the defendant on the project within 14 days of each receipt;

(c) the defendant authorised the plaintiff to sign the contract for the project by a power of attorney dated 4 November 2020 given to him, and the plaintiff accordingly did so;

(d) the defendant had received payments from Foxwell under the project;

(e) the defendant has not, to date, paid the agreed brokerage commission or any part thereof to the plaintiff;

(f) the defendant admitted to the plaintiff the commission due in the sum of USD310,000 on or about 5 October 2021, followed by the defendant's admission on or about 6 October 2021 of the commission due in the sum

of USD312,000. Subsequently on or about 4 March 2022, the defendant admitted the commission in the sum of USD52,114; and

(g) on 10 March 2022, the plaintiff's solicitors issued a letter of demand to the defendant. There was no response from the defendant.

THE PLAINTIFF'S PARTIAL SUMMARY JUDGMENT APPLICATION

[15] The plaintiff claims against the defendant the commission sum of USD412,924.70 or such other amount as found fit by this court.

[16] According to the plaintiff, the payments received by the defendant directly and non-directly, and thus the commission due to the plaintiff, are as set out in the table below ('Table A'):

No	Date	Direct Payments from Foxwell to defendant		Non-Direct Payments from Foxwell to defendant (USD)	10% Brokerage Commission due to plaintiff	
		Mega International Commercial Bank Remittance Advice No	Payment received by defendant (USD)		On Direct Payments by Foxwell to defendant (USD)	On Non-Direct Payments from Foxwell to defendant (USD)
A	B	C	D	E	F	G
1	10 March 2021	AABV 1031000072-0001	193,576.80		19,357.68	
2	31 May 2021	AABV 1053100030-0001	265,754.20		26,575.42	
3	19 July 2021	AABV 1071900037-0001	500,000		50,000	
4	20 August 2021	AABV 1082000059-0001	200,000		20,000	
5	31 August 2021	AABV 1083100061-0001	379,343.50		37,934.35	
6	1 October 2021	AABV 1100100057-0001	726,137.10		72,613.71	

No	Date	Direct Payments from Foxwell to defendant		Non-Direct Payments from Foxwell to defendant (USD)	10% Brokerage Commission due to plaintiff	
		Mega International Commercial Bank Remittance Advice No	Payment received by defendant (USD)		On Direct Payments by Foxwell to defendant (USD)	On Non-Direct Payments from Foxwell to defendant (USD)
A	B	C	D	E	F	G
7	24 February 2022	AABV 2022400073-0001	1,094,513.40		109,451.34	
8	7 May 2021			154,705		15,470.50
9	5 August 2021			250,000		25,000
10	2 September 2021			50,000		5,000
11	4 January 2022			242,781		24,278.10
12	4 January 2022			72,436		7,243.60
TOTALS					335,932.50	76,992.20
TOTALS			4,129,247		412,924.70	

[17] Insofar as the partial summary judgment is concerned, the plaintiff claims against the defendant, a sum of USD335,932.50 being the principal amount of 10% commission due to the plaintiff on direct payments received by defendant from Foxwell, which are shown in items 1 through 7 of the Table A above. As part of the summary judgment, the plaintiff also claims interest on each of the payments shown in items 1 through 7 of the Table A calculated at the rate of 5%pa from the date of expiry of 14 days after the receipt date shown in column B of the Table A.

[18] The above said direct payments were remitted by Foxwell to the defendant through Mega International Commercial Bank in seven tranches, as set out in the above table.

[19] The plaintiff filed an application for partial summary judgment, after the defendant has entered appearance, on grounds that the defendant has no defence insofar as the claim for the commission of USD335,932.50 based on the total sum of USD3,359,325 directly received by the defendant from Foxwell is concerned.

[20] For avoidance of any doubt, the claim made in this section for summary judgment is only for a part of the full claim and the plaintiff's prayer is that the remainder of the claim, which is for the balance sum of USD76,992.20 and due interest thereon, goes for trial.

THE DEFENDANT'S CONTENTIONS

[21] The defendant contents that it need not pay the 10% commission because:

(a) the commission agreement is subject to the consent of one Dolphin Geo Subsea Pte Ltd ('Dolphin') through a teaming agreement dated 9 June 2020 entered into between Dolphin and the defendant;

(b) the plaintiff cannot rely on the contents of the commission agreement because the payment term of the commission was varied from 'commission due to be paid within 14 days upon the defendant's receipt of each payment from Foxwell' to 'commission due to be paid upon the defendant's receipt of the retention sum from Foxwell';

(c) the plaintiff is not entitled to claim the 10% commission on behalf of GPK; and

(d) the defendant has a counterclaim against the plaintiff for overpayment in respect of the assistance and services that the plaintiff provided for the defendant in the execution of the contract.

[22] Having heard oral submissions from counsel and after perusing the written submissions filed, I find no bona fide triable issues raised by the defendant in respect of the plaintiff's claim for summary judgment.

THE DEFENDANT'S FIRST AND SECOND CONTENTIONS

[23] In relation to the teaming agreement between the defendant and Dolphin, the plaintiff is not a party to and not involved with the teaming agreement, which is an internal matter between the defendant and Dolphin.

[24] Nowhere in the commission agreement is it stated that the commission payable was subject to Dolphin's consent or any agreement made between the defendant and Dolphin, which was then already there at least as early as 9 June

2020. The plaintiff's involvement insofar as this case is concerned is to do brokerage only for the defendant, and not Dolphin, to secure a contract with Foxwell. It was up to the defendant how it would carry out the works under the contract and the subcontractors to be appointed.

[25] It is irrelevant to this case whether Dolphin was minded or not to pay the commission as and when payments were received by the defendant from Foxwell. The plaintiff's agreement is with the defendant only and not Dolphin.

[26] Further, the conditions laid out in the teaming agreement do not support the defendant's version that the commission payable to the plaintiff is subject to Dolphin's consent. The relevant clauses of the teaming agreement are as follows:

> 3.0 RELATIONSHIP OF THE PARTIES
>
> 3.2 Unless agreed otherwise in writing in advance, each Party shall be responsible for meeting its own costs associated with any and all marketing, sales, estimating, bid preparation or any other nonchargeable work associated with any opportunity or potential contract that the Parties have agreed to pursue.
>
> 3.5 Neither Party shall make any representation or commitments on behalf of the other Party and shall not be deemed the agent of the other Party without receiving the prior written approval of that Party.
>
> 3.6 Nothing in this Agreement shall constitute, create, nor in any way be, interpreted as a joint venture (incorporated or unincorporated), partnership or formal business organisation of any kind. Each Party is an independent contractor and neither of the Parties shall be considered to be the agent, employee or joint venture partner of the other Party for any purpose whatsoever.
>
> 3.9 The respective individual business of the Parties hereto shall not be affected by this Agreement and the Parties shall not have any claims against their business assets or undertakings of the other.

[27] The defendant then went on to contend that the commission is due to be paid only upon the defendant's receipt of the retention sum from Foxwell.

[28] The retention sum came about as follows:

(a) it was a requirement of the contract that the defendant furnishes bank guarantee/performance bond;

(b) the defendant was not able to furnish the same; and

(c) hence, a supplementary agreement was made between Foxwell and the defendant whereby a retention sum of 10% was to replace the bank guarantee/performance bond.

[29] In the first place, there is no credible evidence that the commission agreement recorded by the defendant's letter dated 21 September 2020 was varied to the effect that the commission would be paid from any retention sum. **A**

[30] The retention sum being a replacement for the bank guarantee/performance bond does not in any way affect the commission payable to the plaintiff as agreed in the commission agreement. **B**

[31] It follows that the obligation of the defendant to pay the commission is not tied to the retention sum. **C**

[32] In fact, even when the defendant made an offer to pay a lower commission in three instalments as lately as 4 March 2022, there was no mention of any need for the consent from Dolphin or that the same was being tied to the retention sum, or that the retention sum account was not closed by then. **D**

[33] The commission payable is still 10% of the payments received by the defendant from Foxwell, regardless of the source from which the defendant would pay the same. **E**

[34] In fact, the plaintiff had obtained confirmation from Foxwell that the contract has been completed and the entire final accounts between the defendant and Foxwell, including the retention sum, was closed. **F**

[35] Notably, the defendant had admitted that so far, Foxwell has paid them a sum of USD3,359,286.50, save that they alleged the retention sum has not been paid. However, the retention sum was agreed to be set off from the amount payable by Foxwell to the defendant. It is disingenuous for the defendant to claim that the retention sum was never 'paid' by Foxwell under the circumstances. **G**

[36] The defendant's admission supports the plaintiff's version that Foxwell has paid the defendant, albeit a slight discrepancy in the total sum admitted, while the actual sum that was remitted to the defendant is indeed USD3,359,325 in accordance to the seven remittance advices. **H**

[37] Accordingly, the defendant has no defence insofar as the partial summary judgment is concerned. **I**

THE DEFENDANT'S THIRD CONTENTION

[38] The defendant's allegation that the plaintiff is not entitled to claim the 10% commission on behalf of GPK is baseless for the following reasons:

(a) the plaintiff requested from the defendant 10% commission as his brokerage fee, which the defendant agreed. The defendant then issued a commission agreement to the plaintiff only, and at the request of the plaintiff, the 10% commission is to be paid jointly to him and his nominee, GPK. GPK has absolutely assigned all its right for the commission to the plaintiff by the assignment deed in which the defendant was notified of the same. Accordingly, the entire commission agreed is payable to the plaintiff;

(b) the defendant's allegation that the assignment deed is not authentic is a bare assertion. The defendant has been aware at all material times that Ms Jasmine Liu, who executed the assignment deed, was representing GPK in this matter, as can be seen from numerous email correspondence between the said Ms Jasmine Liu (for GPK) and the defendant concerning the project;

(c) no such allegation was even made when the defendant was notified of the assignment deed on 10 March 2022; and

(d) even in the absence of the assignment, the plaintiff is the right person with locus to claim the commission from the defendant as the commission agreement is between the plaintiff and defendant. There is no reason for GPK to be made a party to this action.

THE DEFENDANT'S FOURTH CONTENTION

[39] The defendant's counterclaim is premised on the following allegations:

(a) the plaintiff had supplied guard boats, Taiwanese crew ship and various other supporting services. Hence, the plaintiff is the main supplier for the project ('plaintiff's services');

(b) the defendant had paid a sum of USD428,812.45 for the plaintiff's services; and

(c) there was an overpayment of USD126,500 to the plaintiff.

[40] To support the above allegations of overpayment, the defendant produced a statement of account of the plaintiff dated 24 May 2022 and an email dated 3 November 2021.

[41] The defendant's allegation of overpayment is not supported by his own document.

[42] Quite apart from the fact that plaintiff's services arose from a separate and independent contract from the commission agreement, the plaintiff has demonstrated that this issue of 'overpayment' has been closed between the parties.

[43] More specifically, the defendant's very own statement of account produced showed the account of the plaintiff with zero balance as at 24 May 2022. There is therefore no overpayment. Even in the defendant's offer made to the plaintiff as lately as 4 March 2022, the defendant did not mention anything about its purported overpayment claim.

[44] In any case, if there were indeed overpayment, such overpayment which arisen from a different and independent contract cannot be set off against the claim for the commission.

[45] In *United Trade Arena (M) Sdn Bhd & Ors v Bank Pertanian Malaysia Bhd* [2016] 2 MLJ 65; [2016] 2 MLRA 116, the Court of Appeal held as follows:

> Counterclaim and set off against the plaintiff
>
> [28] The *defendants contended that the learned judge had failed to consider the details of the counter claim and set off* raised by the defendants in the present suit. The learned judge in her grounds of judgment was of the view that a *summary judgment may be given despite the filing of a counterclaim and set off by the defendants*. We agreed with the learned judge as *it has been decided by a string of case laws that, notwithstanding the filing of a counterclaim, summary judgment may still be given* ...

CONCLUSION

[46] In the above premises, the court grants an order in terms of prayers (1), (2) and (4) of encl 5 with costs fixed at RM10,000 subject to payment of allocator.

Order in terms of prayers (1), (2) and (4) of encl 5 granted with costs of RM10,000 subject to payment of allocator.

Reported by Dzulqarnain Ab Fatar